

COMMENT



Our Flagging Rights

A country's flag is a potent emblem of its nationhood. It therefore evokes both reverence and, for those who oppose the state's policies, abhorrence. For the latter of course it provides a graphic demonstration of protest. A picture of a burning flag is worth a thousand words — especially on the evening news.

Does this peculiar symbolic duality entitle flags to legal protection against physical harm? To those who venerate, or even merely respect, a nation's flag, its desecration may occasion distress and even precipitate threats to public order. Should the criminal law therefore punish such mutilation? Or does freedom of speech include the right to deface our national and regional banners? The Court of Final Appeal has unanimously ruled that it does not.¹

The PRC Law on the National Flag was adopted by the Standing Committee of the National People's Congress (NPC) and promulgated on 28 June 1990. Article 19 prohibits 'publicly and wilfully burning, mutilating, scrawling on, defiling or trampling upon' the flag. On 1 July 1997, this law was extended to the Hong Kong SAR by Article 18(2) of the Basic Law by way of a list of applicable national laws in Annex III. The SAR was therefore obliged to enact legislation to render these acts criminal, and it did so in the form of the National Flag and National Emblem Ordinance, section 7 of which replicates the language of Article 19 of the PRC Law on the National Flag.² The Regional Flag is protected by similar provision in section 7 of the Regional Flag and Regional Emblem Ordinance.

In the course of a public demonstration in support of democracy on the Mainland, the two respondents comprehensively defaced both the national and regional flags. Their appeal against conviction by a magistrate was allowed by the Court of Appeal.³ The appeal committee granted leave to appeal to the Court of Final Appeal on a point of law of great and general importance, namely whether section 7 of the two ordinances contravened the Basic Law.

In answering the question in the negative, the court held that freedom of speech as protected by article 27 of the Basic Law, article 19 of the International Covenant on Civil and Political Rights, and article 16 of the Bill of Rights Ordinance was not seriously eroded by the prohibition. Nor, the Chief Justice declared, did it undermine the right to express the same message by other

¹ *Hong Kong SAR v Ng Kung Siu and Lee Kin Yun* [2000] 1 HKC 117.

² 'Whoever desecrates the National Flag of the People's Republic of China by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling upon it shall be investigated for criminal responsibilities according to law ...' S7 of both ordinances provides: 'A person who desecrates the national [or regional] flag ... by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence ...'

³ [1999] 1 HKLRD 783; [1999] 2 HKC 10.

means.⁴ And the protection of public order (or *ordre public*) was, in any event, acknowledged by these declarations to constitute a legitimate limitation of free speech.⁵

Whether or not either flag is, as a matter of fact, sacred to anyone in Hong Kong, as found by the magistrate,⁶ the need for its protection by our criminal law ought to rest on firmer ground. The Court of Final Appeal was satisfied that the prohibition was justified first, because desecration may undermine public order, and, secondly, that the admitted restriction on free speech is *de minimis*.

The first proposition is, with respect, unconvincing. Even if the legislature believed that the statutes were necessary to safeguard the elusive concept of '*ordre public*' (which is doubtful), this ought not to have driven the court to the conclusion that it was indeed so. There are, moreover, already existing offences for which individuals might be prosecuted, including, in serious cases, riot and unlawful assembly under the Public Order Ordinance. Where the flags are public property, the defendant could be charged with criminal damage, arson, or destroying property under the Crimes Ordinance. It is significant, as the Court of Appeal observed, that in none of the leading common law jurisdictions is flag desecration an offence. Why this omission if a burning flag constitutes so powerful an invitation to violence?

Nor does the second argument cut much ice. It is of course true that the prohibition is only a limited restriction on free speech.⁷ How many of us will feel our personal liberty diminished by these statutes? And it must also be correct, as the court maintained, that the legislation does not impede one's freedom to express the same message by other methods. But this logic defines away a democratic right in the absence of compelling evidence that its exercise should invoke a criminal sanction.

A conclusion that the statutes were an unconstitutional violation of the law's preservation of freedom of speech, undermines the court's own asseveration that:

⁴ At 136.

⁵ Thus article 19(3) of the ICCPR provides that restrictions on freedom of speech may be justified where they are necessary 'for the protection of national security or of public order (*ordre public*) ...'. The court found that '*ordre public*' 'extends beyond the common law notion of law and order and 'includes what is necessary for the protection of the general welfare or for the interests of the collectivity as a whole.'

⁶ He said that the flag of the PRC 'has been ... a sacred symbol respected by all Chinese regardless of their social, political or philosophical beliefs,' [1999] 2 HKC 10 at 15.

⁷ The Supreme Court of the United States has on two recent occasions rejected the argument that 'flag-burning' lies outside the protection of the First Amendment, though, in both cases, by a majority. See *Texas v Johnson* (1989) 491 US 397, and *United States v Eichman* (1990) 496 US 310. It would have been open to the Court of Final Appeal to have adopted the view expressed by Brennan J in the first decision: 'We can imagine no more appropriate response to burning a flag than by waving one's own... The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong.'

Freedom of expression is a fundamental freedom in a democratic society. It lies at the heart of civil society and of Hong Kong's system and way of life. The courts must give a generous interpretation to its constitutional guarantee. This freedom includes the freedom to express ideas which the majority may find disagreeable or offensive and the freedom to criticise governmental institutions and the conduct of public officials.⁸

The judgment is therefore a setback for the protection of rights. The early promise signalled by the Court of Final Appeal's robustly libertarian decision in *Ng Ka Ling v Director of Immigration*⁹ has been undermined. There the learned Chief Justice unequivocally rejected the decision of the Court of Appeal in *HKSAR v Ma Wai Kwan David*¹⁰ and asserted that the exercise of the court's jurisdiction to declare laws inconsistent with the Basic Law to be invalid, was a matter not of discretion, but of obligation. It was, the court held, a constitutional check on the executive, legislature, and even the National People's Congress. In interpreting the Basic Law, the courts were to adopt a purposive approach that reflected the spirit of the principle of 'one country, two systems.' And, in respect of 'the constitutional guarantees for [sic] the freedoms that lie at the heart of Hong Kong's separate system':

The courts should give a generous interpretation to the provisions of Chapter III [containing the fundamental rights and duties of residents] ... in order to give to Hong Kong residents the full measure of fundamental rights and freedoms so constitutionally guaranteed.¹¹

And this approach yielded the court's liberal construction of the right of abode as formulated in BL24, and, of course, the Government's referral of the question to the Standing Committee of the NPC under BL158 with its inevitable unfortunate result.

When the court was next seised of the matter, however, one discerns little evidence of its earlier fidelity to individual rights. The majority accepted the fact that the Standing Committee's power to make an Interpretation under BL158(1) was, in this case, unfettered.¹² Nevertheless, in his dissenting judgment, Bokhary PJ valiantly attempts to import into the evaluation of the Director's decision to remove the applicants from Hong Kong 'underlying principles' of fairness that inhabit the common law.¹³ It is these principles that provide the small, but essential, shaft of light that one would have expected our

⁸ At 135 per Li CJ.

⁹ [1999] 1 HKC 291.

¹⁰ [1997] 2 HKC 315, [1997] 1 HKLRD 761.

¹¹ At 135.

¹² *Lau Kong Yung v Director of Immigration* [1999] 4 HKC 731 at 754-755.

¹³ At 775-777.

highest court to deploy. The surrender to constitutional reality might at least have followed a struggle. But there is none.

The courts, it is trite to observe, man the ramparts of our liberty. Judges have the power and the responsibility to safeguard individual rights. The Basic Law promises the survival of the common law, albeit in a potentially inhospitable setting. Yet judges must resist the constitutional vice that threatens to squeeze these values from the system. This is a difficult, but by no means an intractable challenge; the Court of Appeal in the flag case, and several other judges, have demonstrated its viability. But it requires a more comprehensive, coherent theory of judicial interpretation to safeguard the scheme of rights that our new dispensation vouchsafes.¹⁴

Is it not because we believe that our legal system is infused with the values of fairness, equality and justice that we seek to preserve it? One must not exaggerate the virtues of the common law, but few will dispute that its perpetuation is a *sine qua non* of our liberty. This is largely because a legal system consists not merely of rules. It is a sort of moral system. As one influential contemporary jurist demonstrates, law contains also 'non-rule standards' such as principles and policies.¹⁵ When faced with a hard case, a judge must draw on these moral and political standards in order to reach a decision. He is engaged in a process of 'constructive interpretation'¹⁶ by which he seeks to provide the best possible interpretation of what the law is. This will include his own conception of the 'great network of political structures and decisions of his community.'¹⁷ He must enquire 'whether it could form part of a coherent theory justifying the network as a whole.'¹⁸

There is, especially in the early years of the SAR, a critical need for our judges to formulate this kind of approach to our system of rights. A decision should not turn on the judge's own intuition or discretion, for this would render our rights fragile things to be sacrificed by courts on the altar of community interests or other conceptions of good. And there are already disquieting signs of this approach emerging in Hong Kong. If individual rights are to be accorded the protection they deserve, they must be regarded as part of the law itself. A judge must think of himself not as giving voice to his personal moral or political convictions (or even those that he thinks the legislature or the majority of the electorate would approve), but 'as an author in the chain of common law.'¹⁹ This is the vision of what Dworkin calls 'law as integrity'. It

¹⁴ See Raymond Wacks, 'The Judicial Function' in Raymond Wacks (ed), *The Future of the Law in Hong Kong* (Hong Kong: Oxford University Press, 1989).

¹⁵ See in particular, Ronald Dworkin, *Taking Rights Seriously*, new impression with a reply to critics (London: Duckworth, 1978), *Law's Empire* (Cambridge, Mass; London: Belknap Press, 1986), *Freedom's Law* (Oxford: Oxford University Press, 1996).

¹⁶ Dworkin, *Law's Empire*, (ibid) p 52.

¹⁷ Ibid, p 245.

¹⁸ Ibid.

¹⁹ Ibid, p 239.

accepts law and legal rights wholeheartedly ... It supposes that law's constraints benefit society not just by providing predictability or procedural fairness, or in some other instrumental way, but by securing a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does.²⁰

It constitutes an amalgam of values that form the essentials of a liberal society and the rule of law. Its significance for the maintenance of the common law in Hong Kong is therefore plain. The judge must 'construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well.'²¹ Where the legal materials allow for more than one consistent reconstruction, he will decide on the theory of law and justice which best coheres with the 'institutional history' of his community. Most importantly, his interpretation should be 'constructive' one that depicts our system in the best possible light. He must choose the version of the law that best justifies the legal material: the 'soundest theory of the law.' This judgment will inevitably be one that justifies and explains our community, an essentially *moral* account of the law.

Freedom of speech is plainly a fundamental right to be abridged only in exceptional circumstances. As Lord Hoffmann recently put it:²²

It cannot be too strongly emphasised that outside the established exceptions, or any new ones which Parliament may enact in accordance with its obligations under the Convention [for the Protection of Human Rights and Fundamental Freedoms], there is no question of balancing freedom of speech against other interests. It is a trump card, which always wins.²³

Although the institutional history of Hong Kong does not reveal a record of democracy, and individual rights have only recently been expressed in the emphatic form of written declarations, our courts have long cleaved to the common law's tradition of protecting rights.²⁴ In these uncertain times, however, judges need to construct a more resilient fortress to resist the desecration of our rights, above which the flag of freedom might long be hoisted.

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²⁰ Ibid, pp 95-96.

²¹ Ibid, pp 116-17.

²² *R v Central Television plc* [1994] 2 WLR 20, 30.

²³ This may overstate the position, though the learned judge did recognise that 'a right of privacy may be a legitimate exception to freedom of speech', at 31.

²⁴ See Peter Wesley-Smith, 'Protecting Human Rights in Hong Kong' in Raymond Wacks (ed), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992).

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